No. 83-1337

# In the Supreme Court of the United States

OCTOBER TERM, 1983

HERO LANDS COMPANY, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Whether the courts below correctly determined that petitioners' claim for the taking of an avigation easement was barred by the statute of limitations, 28 U.S.C. 2501, because the cause of action accrued more than six years before this lawsuit was filed.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not yet reported. The opinion of the United States Claims Court (Pet. App. A3-A15) is reported at 554 F. Supp. 1262.

### JURSIDICTION

The judgment of the court of appeals was entered on November 10, 1983. The petition for a writ of certiorari was filed on February 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioners, corporations owning 16 tracts in Plaquemines Parish, Louisiana, near the New Orleans Naval Air Station, sued the United States on November 28, 1979, in the United States Court of Claims (now the United States Claims Court), alleging that overflights to and from the naval air station have taken "avigation easements."

Following a trial on the issue of liability, the Claims Court entered judgment dismissing the complaint. In its opinion, supported by detailed findings of fact,[1] the Claims Court divided petitioners' 16 tracts into three categories, and determined that petitioners were not entitled to compensation for the taking of an avigation easement as to any tract.

The court found that as to the first set of tracts, the highest and best use was and is for industrial development (Pet. App. A5). The court further found that the government aircraft operations at the naval air station have not substantially diminished the value of these lands for such purposes. Accordingly, the United States was not liable for a taking of avigation easements over these lands (*id.* at A5-A6).[2]

The second group of tracts had been overflown at altitudes of not less than 600 feet above ground level, and were not suitable for industrial development (Pet. App. A6-A7). The court determined that the flights over these lands did not constitute a direct, immediate and substantial interference with the use and enjoyment of the property. Thus, it found that no taking had occurred (*id.* at A6-A11). In addition, the Claims Court concluded that, as to all tracts in the second category, the six-year statute of limitations of 28 U.S.C. 2501[3] barred recovery. Specifically, the trial court

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[1]In addition to its opinion, the Claims Court made extensive factual findings in support of its decision. These findings are found at C.A. App. 27-49.

[2]The court also found that some of the tracts in the first category were burdened with avigation easements acquired by the government through eminent domain proceedings in 1958 (Pet. App. A6).

[3]28 U.S.C. 2501 provides in part:

> Every claim of which the United States Claims Court has jursidiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

found that aircraft operations had caused no new adverse consequences during the limitations period (Pet. App. A12-A14) and that changes at the naval air station in 1978-1979 did not create a fresh taking causing accrual of a new claim (*id.* at A12-A15).

The Claims Court also found that the third set of tracts, which were overflown at minimum altitudes of 200-340 feet, had not suffered a taking (Pet. App. A14). Many of these tracts were already subject to an avigation easement acquired through condemnation proceedings in 1958 (*ibid.*). Furthermore, the court determined that aircraft operations at the naval air station during the six-year period immediately preceding this suit did not adversely affect the use of these tracts to any substantially greater extent than they had before this six-year period, despite the operational changes of 1978-1979. Therefore, any taking claim with respect to those tracts was also barred by 28 U.S.C. 2501 (Pet. App. A14-A15).

2. On appeal, the Federal Circuit held (Pet. App. A2) that the statute of limitations embodied in 28 U.S.C. 2501 bars all of petitioners' claims, and that "[i]f any taking occurred, it occurred more than six years before this action was filed, and changes [in aircraft operations at the naval air station] in 1978-1979 were insufficient to constitute a new taking."

## ARGUMENT

The decision below, which is based on detailed factual determinations, is correct, does not conflict with any decision of this Court or any other court of appeals and does not present an important question requiring resolution by this Court. Accordingly, further review is not warranted.

1. In effect, petitioners request this Court to review the factual determination of the Claims Court, affirmed by the court of appeals, that any diminution in the value of their property occurred long before the six-year period prescribed by the statute of limitations and that changes in air operations at the naval air station in 1978-1979 were not of sufficient magnitude to cause the accrual of a fresh taking claim (Pet. App. A2, A11-A15). This Court has often stated that, absent extraordinarily compelling circumstances, the Court will not review such factual findings. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); cf. *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8. No such unusual circumstances exist here.

2. Petitioners acknowledge (Pet. 7) that the Claims Court "employed the traditional test and scrutinized the military aircraft operations conducted at [the naval air station] paying particular attention to the fact that jet aircraft operations had been conducted [there] since 1958." Despite their concession that under the "traditional test" and "existing precedent" (Pet. 8) this action is time-barred, petitioners seek to create a novel exception to the statute of limitations because the land they own is uninhabited.

The record in this case does not substantiate petitioners' claim that the effects of the overflights could not be ascertainable by the exercise of due diligence. On the contrary, the proximity of petitioners' "uninhabited" lands to occupied property belies such an assertion.[4] In any event, any factual dispute on this point was resolved against petitioners by the courts below, and is not appropriate for review by this Court. *Branti* v. *Finkel*, 445 U.S. at 512 n.6.

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[4]See map of New Orleans Naval Air Station and surrounding tracts, which indicates the promixity of developed and inhabited lands near the air station. This map was included in the Supplemental Appendix, Vol. IV, filed in the court of appeals.

Petitioners' claim accrued when all events occurred that affected the alleged liability of the government. *Japanese War Notes Claimants Ass'n of the Philippines, Inc.* v. *United States*, 373 F.2d 356, 358 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967), reh'g denied, 390 U.S. 975 (1968); *Sauer* v. *United States*, 354 F.2d 302, 304 (Ct. Cl. 1965). The trial court found that this took place before the six-year period preceding the institution of this action, and petitioners point to no sound reason why this Court should review this factual determination. It follows then that petitioners' accrual argument is without merit and was properly rejected.

3. a. Petitioners' contention that their claim arose upon the 1979 issuance of the Air Installation Compatible Use Zones (AICUZ) study does not merit this Court's consideration. Petitioner's argument misapprehends the nature and purpose of the study, and conflicts with numerous soundly-based precedents.

As the trial court found, the AICUZ study attempts to identify compatible as well as incompatible land uses in the vicinity of an air station, with the aim of encouraging compatible development (C.A. App. 37). It does not (and is not intended to) indicate whether particular aircraft operations over specific parcels of land have reached a level amounting to "substantial interference" with use and enjoyment, thereby constituting a taking. Nor does the AICUZ study, by itself, establish or forecast actual noise levels from specific aircraft, flight patterns or flight directions (C.A. App. 38-39, 42).

Thus, petitioners fundamentally err when they argue (Pet. 7) that the AICUZ study informed them "for the first time" that the land is unsuitable for residential development as a result of jet overflights. The AICUZ document does

not give notice of a compensable "taking." AICUZ recommendations are acceptable for community-wide planning purposes, particularly where, as here, the planners appreciate the limitations of the study and the need for additional information. The methodology, however, has severe limitations when the question is one of individual annoyance and of interference with individual enjoyment of property, as in this case. Because of these serious limitations, the AICUZ study neither creates nor gives notice of a Fifth Amendment taking.

b. To hold that the dissemination of an AICUZ study causes the accrual of a compensable taking claim would be mistaken from both a legal and a public policy standpoint. In *NBH Land Co.* v. *United States*, 576 F.2d 317, 318 (Ct. Cl. 1978), the Court of Claims rejected the contention that communications by Army officials to local interests of an intent to acquire land owned by plaintiffs destroyed the marketability of the property and constituted a taking under the Fifth Amendment. The court stated that "[m]ere candor by public officials about their plans has never been held to constitute a taking." 576 F.2d at 319. The same sound reasoning should apply to preserve the cooperation fostered by the AICUZ program.

On several occasions the Court of Claims has rejected the argument that contacts and influence on local zoning officials who have the authority to upzone or downgrade property constitute a taking. *De-Tom Enterprises, Inc.* v. *United States*, [redacted], 552 F.2d 337, 339-340 (Ct. Cl. 1977); *Nalder* v. *United States*, 217 Ct. Cl. 686 (1978) (involving "Greenbelt," a predecessor concept to AICUZ). The government does not effect a taking when it, "as an interested landowner, does no more than convince a state or local agency to impose" a restriction on development, "in

the same way as might any other neighboring property owner or citizen." *De-Tom*, 552 F.2d at 339.[5]

If the AICUZ concept is viewed as government regulation, petitioners' claim that the AICUZ study in effect constituted a taking is refuted by the rule that government regulatory action that temporarily reduces property values or results in a loss of potential profits is not a taking. See *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 131 (1978); *Deltona Corp.* v. *United States*, 657 F.2d 1184, 1191 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982). Cf. *Agins* v. *City of Tiburon*, 447 U.S. 255, 263 n.9 (1980); *Fresh Pond Shopping Center, Inc.* v. *Rent Control Board of Cambridge*, 388 Mass. 1051, 446 N.E. 2d 1060, appeal dismissed, *sub non. Fresh Pond Shopping Center, Inc.* v. *Callahan*, No. 82-2151, (Oct. 11, 1983). Of course, here petitioners have not even demonstrated a reduction in property values or loss of potential profits, apart from purely speculative losses.

4. Finally, the trial court found that the government's aircraft operations had not prevented the highest and best uses to be made of petitioners' tracts (Pet. App. A5-A6, A13). The court found only that the government's air operations had deprived parts of certain tracts of a "speculative element of value" as sites for residential and commercial development. The court found that the evidence did not disclose that this speculative element added substantially to the fair market value of the lands (Pet. App. A12-A13, A15). Petitioners must prove "substantial interference"

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[5]Furthermore, the AICUZ program recognizes that zoning is a matter of local government action. In this case, Chalin O. Perez, President of the Plaquemines Parish Commission Council, informed the former commanding officer of the naval air station that under no circumstances would the Council surrender its authority to the federal government (Tr. 413; C.A. App. 186).

with the use and enjoyment of their property in order to recover for an overflight taking. *United States* v. *Causby*, 328 U.S. 256, 266 (1946); *A.J. Hodges Industries, Inc.* v. *United States*, 355 F.2d 592, 594 (Ct. Cl. 1966). Interference with a merely speculative element of value, which has not been shown to add in any substantial way to the property's fair market value, does not constitute "substantial interference" with petitioners' use of the land. See *Pueblo of Sandia ex rel. Chaves* v. *Smith*, 497 F.2d 1043, 1046 (10th Cir. 1974); *Speir* v. *United States*, 485 F.2d 643, 648 (Ct. Cl. 1973); *Mid-States Fats and Oils Corp.* v. *United States*, 159 Ct. Cl. 301, 310 (1962).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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